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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of LORI ANN and RICHARD EDWARD HORWITZ.	
LORI ANN HORWITZ, Respondent, v. RICHARD EDWARD HORWITZ, Appellant.	G050262 (Super. Ct. No. 01D007233) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Nathan R. Scott, Judge. Motion to dismiss appeal. Motion granted. Appeal dismissed.

Law Offices of Jeffrey W. Doeringer and Jeffrey W. Doeringer for Appellant.

Mark S. Rosen for Respondent.

* * *

Richard Edward Horwitz (husband) appeals from the trial court's order denying his motion to correct an alleged clerical error in a final judgment of dissolution. Lori Ann Horwitz (wife) filed a motion to dismiss the appeal, in part, on the ground the appeal is from a nonappealable order. We agree and dismiss the appeal.

BACKGROUND

This action has been pending since August 2001, when wife petitioned for divorce. The trial court, Judge Nancy Wieben Stock, issued a decision on the reserved issues in 2003 and ordered wife's counsel to submit a formal judgment. Although the parties continued to appear in court regularly regarding child visitation, no judgment was entered and the case lingered until 2012. In October 2012, wife's counsel served husband at his address of record with a proposed judgment, along with a letter stating it would be submitted to the court for signature without husband's approval unless he responded within 10 days. Husband did not respond and Judge Wieben Stock signed the judgment on the reserved issues on January 3, 2013.

Husband did not appeal from the judgment. Instead, he moved to vacate or set aside the judgment, claiming he was improperly served. Husband asserted he discovered the judgment in February 2013 only because he "periodically check[ed] the court's website to see if any movement was happening on his case." Husband's motion also requested partial relief on that part of the judgment relating to the division of community assets and debts.

The court denied the motion, finding no basis to set aside the judgment. Wife had shown husband was properly served at his address on file with the court. Given that and absence of activity in the case from February 26, 2009 to January 2, 2013, the

court determined husband was not credible in claiming he "serendipitously stumbled onto the judgment on the court website right after it was filed." "In any event, [husband] has largely failed to show any prejudice. The January 2013 judgment properly memorializes (at least in large part) the judgment rendered by the court on May 20, 2003, when it adopted [wife's] asset division in her . . . trial brief. The bulk of [husband's] challenges to the proposed judgment attack the correctness of the judgment rendered, not the accuracy of the proposed judgment. A set-aside motion is not the proper avenue to correct purported judicial error."

Nevertheless, the court agreed with husband that the judgment entered in 2013 incorrectly reflected certain accounts and shares were community property when in fact the judgment rendered in 2003 indicated they were husband's separate property. The court modified the judgment sua sponte to correct those clerical errors, and the clerk gave notice that same date. Husband did not appeal from this order.

Rather, in July 2013, six months and two days after judgment was entered, husband filed a motion to correct that judgment, "so that the amounts given to the assets to be divided are valued in accordance with Judge Wieben-Stock's ruling of May . . . 2003, and the transcript upon which the minute order is based." As to the 2013 judgment, husband contested: "a. findings and orders from proceedings that occurred in 2008 and 2009 regarding custody of [their child]; [¶] b. the incorrect language regarding the Ostler-Smith provision for support; [¶] c. the character (community vs. separate) of the property to be distributed . . . ; and [¶] d. the values assigned to the assets to be distributed."

The court denied husband's motion to correct the judgment, ruling that husband had not demonstrated "any clerical error." Husband appeals from this order.

DISCUSSION

"[T]he right to an appeal is entirely statutory; unless specified by statute no judgment or order is appealable." (*Garau v. Torrance Unified School Dist*. (2006) 137 Cal.App.4th 192, 198.) Under Code of Civil Procedure section 904.1, subdivision (a)(2), a party may appeal "[f]rom an order made after a [final] judgment." However, "not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651, fn. omitted. (*Lakin*).)

"The first requirement . . . is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment. [Citation.] 'The reason for this general rule is that to allow the appeal from [an order raising the same issues as those raised by the judgment] would have the effect of allowing two appeals from the same ruling and might in some cases permit circumvention of the time limitations for appealing from the judgment.'" (*Lakin, supra,* 6 Cal.4th at p. 651, quoting *Rooney v. Vermont Investment Corp*. (1973) 10 Cal.3d 351, 358.)

The order before us does not meet this requirement in that the issues raised in the motion are the same as those that would have arisen in an appeal from the judgment. (*Lakin, supra,* 6 Cal.4th at p. 651.) Because this condition was not met, we need not discuss "[t]he second requirement,] which . . . is that 'the order must either affect the judgment or relate to it by enforcing it or staying its execution.'" (*Id*. at pp. 651-652.)

Neither party cites the pertinent authority. Wife characterizes the motion to correct the judgment as one for reconsideration of the court's denial of his request to set aside or vacate the judgment. She quotes Code of Civil Procedure section 1008,

subdivision (g), which reads: "An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order." Husband denies it was a motion for reconsideration, as it was not labeled as such, did not ask for reconsideration, and did not cite Code of Civil Procedure section 1008. We agree.

Husband asserts the order is appealable, citing Code of Civil Procedure section 904.1, subdivision (a)(2) and *Bowden v. Green* (1982) 128 Cal.App.3d 65, 68, fn. 1. But both authorities merely state the general principle that an order following a final judgment is appealable. The motion to correct clerical errors in *Bowden* did not involve the same issues as those that would have arisen on appeal from the judgment. Rather, *Bowden* concerned "whether a judgment is valid when it is inadvertently signed by the trial judge but correctly reflects the undisclosed stipulation of counsel." (*Bowden*, at p. 68.) As a result, *Bowden* had no occasion to address the rule that the issues in a postjudgment order must be different from those that could be raised in an appeal in order to be appealable. The motion here did not claim the trial court inadvertently signed the judgment and instead raised the same issues that would have arisen in an appeal from the judgment. *Bowden* is thus inapposite.

The record on appeal shows husband discovered the 2013 judgment at most a month after it was entered. Instead of timely appealing from the final judgment, husband filed two motions, the second of which, although termed a motion to correct clerical errors, directly challenged its provisions. "'[T]he right of appeal from the order [denying such a motion] is denied because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appeal, contrary to the intent of the statute. A further reason is that the order on the

motion is merely a negative action of the court declining to disturb its first decision. The first decision being reviewable, the refusal any number of times to alter it does not make it less so.'" (*Spellens v. Spellens* (1957) 49 Cal.2d 210, 228-229.)

DISPOSITION

Respondent Lori Ann Horwitz's motion to dismiss the appeal is granted. The appeal is dismissed. Respondent shall recover her costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.